UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	Criminal Action
v.	)	No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

LOBBY CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Tuesday, December 30, 2014
10:35 a.m.

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P R O C E E D I N G S

THE COURT: Good morning, everybody.

COUNSEL IN UNISON: Good morning.

THE COURT: I want to go over the jury procedures and the questionnaire in some detail, but I think we ought to start by, you know, me telling you what I think you expect me to tell you, which is the continuance and venue motions will be denied. They're not -- anyway, we'll issue a short opinion as to each eventually, but just so it's clear that we're going ahead.

So the list of veniremen was satisfactorily furnished, I think yesterday? Jim McAlear did a great job pulling that together. Let me just tell you a couple of things about it as I understand them, and I'm subject to correction because some of this gets complicated. There are about 2,000 names on the list and that is because it includes people who never responded to the initial jury summons. So if you look at the categories on the list --

MS. CLARKE: Status?

THE COURT: -- under "status," if it says "summoned" and doesn't say "responded," it means they haven't heard from them.

MS. CLARKE: And did they get their replacement summons, do we know?

THE COURT: The replacement summons only goes to summonses that are returned as undelivered. These are

delivered but not heard from.

MS. CLARKE: No responses.

THE COURT: Jim tells me that his experience is that some of those people will show up. They'll obey the summons having not obeyed the obligation to respond. So there will be some numbers -- so he's included them because some of those people may actually show up. And I guess if they do, they'll show up -- they'll be treated in the order here. They'll have to go through the initial screening that everybody does for qualification and so on and so forth to be in the real pool, but that's -- and I think, I don't remember the exact number, it's a several hundred number, which is why it gets up to near 2,000.

There are other people, a smaller number, somewhere in the 200 range, who have requested generally, I think, to be excused for one reason or another, doctors' letter, so on and so forth, but have not furnished the backup information. So the jury clerk holds those. If the person comes in with the doctor's letter typically they're excused, but they're kind of in limbo until the required information, maybe it's airplane tickets to Guatemala or something like that. So that's another smaller number.

So if you take those two out, the number that we thought we were going to have in terms of people who would actually do the questionnaires is about 1,300. That's about

where we are, okay?

MS. CLARKE: Judge, do you know what these notes mean?

THE COURT: Yes. So if you want to look at [redacted] it looks like, is Juror No. 3083. That was his original sequence. But he replaced someone pursuant to the return summons' reissue, second summons. This is one of the supplemental.

MS. CLARKE: This is the second set?

THE COURT: So whenever you see somebody was replaced -- so it says this Juror 3083 replaced the one who was '023 and he takes that spot, so he's Number '23. That's the --

MS. CLARKE: That was the summons return?

THE COURT: Correct. That's the supplemental summons business.

MS. CLARKE: Right.

THE COURT: Okay?

MS. CLARKE: Thank you. That helps.

One other question on this: Apparently the jury clerk can provide it in Excel format if the Court authorizes it. And I don't know -- the government would probably like to have it. It's just easier to work with the names if we have it in Excel.

MR. WEINREB: Yes, we would like that.

THE COURT: I'll check on that. I suspect he operates that way himself. I think he suggested putting this in PDF, and I thought that froze it, which was a good thing because it

is fluid. You know, if he ran it today there would be some changes. So maybe the thing to do is --

MS. CLARKE: If you can provide it --

THE COURT: Well, they're not going to be huge changes, but for the same reason: Somebody will come in with a doctor's letter and they'll get excused so they'll go up. No one will get added to the list who is not already on it; the only thing that will happen is people will get eliminated.

MS. CLARKE: It might shrink.

THE COURT: Right. But it's fluid. So if he ran it again you would get a slightly different list. So he could give you an Excel, but it has a sell-by date.

MR. WEINREB: That's fine. It's just for purposes of -- it's easier to add information if you have extra columns on an Excel spreadsheet.

THE COURT: We'll talk to him about that. I think he can do it. Again, I think the reason that I agreed with him it was better to do it this way, it gave you a fixed --

MR. WEINREB: Sure. Initially that makes sense.

THE COURT: Okay. We have a draft order regarding the selection procedure. I think we've talked a little bit about this. We wanted to give it to you yesterday but Jim was still looking at it and I just wanted to make sure he saw it. But subject to -- actually, maybe we should just -- can you quick run it off and we'll come back?

LAW CLERK: Sure.

THE COURT: It might be just helpful to do it. I should have thought about bringing in extra copies. It's possible we'll make changes to it if Jim has technical suggestions for it.

You've submitted jointly, I think, largely proposed preliminary instruction and proposed questionnaire, and I want to spend some time going through the questionnaire. I have some things I want to talk about.

With respect to the preliminary instructions, I'm going to work with them a little, say things my own way and so on. So I'll try to get you the version I will use for both, before the questionnaires and then before the actual voir dire, by Friday so you'll know it before Monday. But it will be a meld of some others. As you know, we've had a lot of experience with questionnaires and instructions about them lately, and so we'll meld something together.

Have you seen the -- I think it's called the "Call to Serve" video that all jurors are shown for all of our cases? It's part of the orientation in the morning.

MS. CLARKE: No.

THE COURT: If you have a chance, it would be good to review that, see what you think. It's kind of anodyne. You have -- it's introduced by the chief justice about the importance of jury service, and then there's commentary by

Justice O'Connor and Justice Alito going back and forth and so on. And then there's -- this is produced by the Federal Judicial Center -- an FJC person who describes in general terms what the features of jury service are.

It was produced in 2009 so it's reasonably current. One thing that is inaccurate about it is that it presents voir dire as something conducted by the lawyers, which is not our practice. I was actually surprised that it didn't say in some jurisdictions it's done this way and in some jurisdictions it's not, but I think that's probably a minor thing. And then they have some sort of interviews with people who are, said to be, at least, actual jurors talking about their experience and so on. It's kind of interesting.

But you should see it before -- we make sure everybody -- so, I mean, if there's any problem with showing it to people, we should deal with that. That's all. It's about 20 minutes long.

MR. CHAKRAVARTY: Judge, is that available through the clerk's office?

MR. WEINREB: I think it's on the website.

THE COURT: It might be on the website. I believe the title is "Call to Service." You know where it is almost certainly is on the FJC website. But Jim, again, could direct you to it, I'm sure.

So anyway, in outline, we're getting 200 Monday

morning, 200 Monday afternoon, same Tuesday, same Wednesday. We'll have at least 1,200 questionnaires, I guess, as I point out. You know, again, the number 200, some extras will show up, some won't show up, some will be expected to show up on Monday -- well, or the other way around, I guess. Some will be expected to show up perhaps on Tuesday but they'll show up on Monday. It's messy. So the number is not a fixed number. That will be approximate. So we've called them Panel A, B, C, D, E, F.

Here's the draft. So this just sets out the procedure. They'll come in, receive the instructions, they'll be asked to do the questionnaire, they'll be collected. The person will leave then with instructions to return as they learn it from a call-in number that they would get. Again, this is what is standard procedure for smaller cases as well. So on the 5th it will be A and B, and then the 6th will be C and D, and then E and F on Wednesday.

So if you look at Paragraph 3, the jury clerk people will then -- they will actually process the paper by writing the juror number on each page. The reason for that is they've had some experience with -- on occasion somebody drops a pile of them and they get scattered, so you'll know how to reassemble them. All of the filled-out questionnaires are then sent to a vendor who scans them onto a disk, and that will be provided to counsel for each of the panels.

I'm not entirely sure of the timing on that. I think they get them by the end -- well, I say "the end of the day." Panel A will be ready by the end of the day; Panel B, the afternoon Monday panel, may not be available until Tuesday morning. That might be an overnight process. I think that's probably the way it is. And it will follow that pattern. For the C panel on Tuesday morning, you should have it by the end of the day on Tuesday, and at least the D panel by Wednesday morning.

So for the A and B people -- again, this is not my invention; this is the Bulger method that Judge Casper devised that seemed to work out very well. The parties will then confer -- review it themselves first, and then confer and agree likely on people who should be excused. For a list of people the parties agree on to be excused, I don't even want to look at them. I'll take the agreement, which is what she did. And that we would ask for -- the Monday panels by Thursday noontime roughly. So this is a rolling process. Tuesday we do it on Friday, for the Wednesday, we do it on Monday the 12th.

We will then have reduced it by all the people you agree should be excluded, and that will be a significant number. The rest we'll submit, then, to individual voir dire. We won't target only those that one side or the other is especially concerned with; that will come up in the process. I think it is beneficial for everybody for every juror to appear

and say something just so we get a sense of the person. So even if there's somebody who looks like an ideal juror on the basis of the questionnaire, we'll think up of something to ask him or her, okay? And then we'll also ask the problem questions to people.

So what the process asks for is you to tell us -- this is in the middle of Paragraph 5 -- what particular answers you're concerned with about jurors who are still in the pack. Identify the juror number and -- you can just say "Question 35" or something like that, and then when we do the voir dire we can -- if you want to add more, if you want to say "Why Question 35," that's fine. It's extra work. But I think mostly it will be obvious from the question.

And then so -- so when all of that's finished, we will begin the process of calling them in -- Paragraph 6 says "as soon as practicable," so I'm leaving that date a little bit open. They'll come in, and we'll call 20 in the morning and 20 in the afternoon.

I don't know if there are -- did he talk about Courtroom 6? Yeah. "Reports to Courtroom 6." So the way the 20 will come in, they'll come directly to Courtroom 6, which is on the same floor as Courtroom 9, and they'll assemble there, and that's where I will give the group of 20 a second wave of preliminary instructions. And that will be about the unique circumstances of a death penalty case, two phases and so on and

so forth, you know, substantially.

So we'll do the preliminary, and then we'll call them one by one into the courtroom. And, again, following Judge Casper. Judge Casper had the courtroom rearranged to a conference table like this basically. She sat in the well of the court. Using this as an example, defense would be down there, prosecution would be down there, there would be a couple of empty chairs, I think Judge Casper was there, stenographer there, and the juror will be here.

It would be, like other proceedings, televised to the overflow courtrooms, but it would be done from behind the juror focusing perhaps on -- and we can work out the exact physical layout, but I think focusing principally on Judge Casper, and then if a lawyer asked a question. But it would not show the juror except the back of the head basically. Jurors are going to be identified by number.

If the juror had something especially confidential to talk about, they kill the audio. They kept the video but they shut down the audio so that people in the room would hear it but the overflow would not.

In the last several years the circuit has had several cases concerning closing of courtrooms to the public, and there's some concern about the dimensions of that rule. I myself don't quite know where the line is drawn. I'm told by Judge Casper that defense counsel in the Bulger case asked that

five members of the public be in the courtroom so that it was, to some extent, open to the public, the concern being if it was only televised, only sent to the other courtrooms, that there's some hazard that the Court of Appeals might conclude that was not public. So as a precaution, they agreed to have five. I don't know how they were selected, and that's something we might think about.

I suggest we do it as a safety measure. And exactly how we do it, we still have some time to figure it out, I guess. It could be random, it could be that just like the seating for the courtroom generally, we designate one seat for a victim, one seat for a media person, one seat for defendant's family. And we could do something like that so that it's a mini courtroom. But anyway that's something.

But anyway, so in that format the juror would come in, be asked the questions. Again, if it was confidential, the audio would go down. And then after each one there would be a decision. If there was a motion by either side to strike for cause, that would be decided right then. The juror would go back to the courtroom before the discussion, obviously. And at the end of the session, in the morning, you know, ten people would be excused for cause, ten people would be told to go home, call this number, wait for what happens next. So that's generally the process, and we'll do that until we have enough people. My guess is the process will take us into the third

week. It would be nice if it didn't, but we'll do what we have to do.

So that sort of dovetails with, you know, some of the concerns defense has expressed about adequate trial preparation, and I think some of those are valid concerns. I think it would be helpful to everybody, including the defense, if the government were able to tell us substantially in advance what the order of witnesses is likely to be realistically. And my suggestion is this: That actually by Friday -- I assume you've thought about this and know who you want to call -- that you could tell us -- not only the defense but I would like to know too -- who and in what order would be the witnesses for the first two weeks of trial. Sketch it out, what your plan is.

Plans get deviated from. We'll adjust to that. But if -- I think it will reduce the anxiety and the effort on the defense part if they know they have to deal with Mr. Smith as the first witness. I think it would be helpful if the exhibits expected to be used with Mr. Smith were also disclosed in connection with that.

Now, while I'm on the subject of exhibits, I guess, at some point -- and I think it's Friday we talked about for me, anyway, you were going to give me a disk -- with all of the exhibits. I assume the defense is going to see all the exhibits on the disks?

MR. WEINREB: Yes, your Honor. They're actually --

THE COURT: And that will be, then -- if it were a smaller case, it would be like the JERS list? I don't know. Have you done a JERS trial?

MR. WEINREB: A JERS trial?

MR. CHAKRAVARTY: JERS.

THE COURT: J-E-R-S. In the beginning the parties usually jointly, it won't be the case here, produce a disk that's loaded into JERS which has all the possible exhibits for either side, and then they're admitted and sent to the system as they're admitted and so on. I think we talked about it. I know I talked to the clerk about possibly not doing that, trying to do that all at the beginning of the case because of the volume, and we would on some schedule -- it could be just at the end of the case or maybe it could be periodically during the case -- put in those that have actually been admitted.

It's customary, as I'm sure you know in any case, that there will be a list of 100 exhibits, and 38 get admitted actually, you know. So anyway -- but that mass list for the government's will be such that if you see Smith is going to talk about Exhibit 38, you can go to this and find Exhibit 38 and see what it is. Is that right?

MR. WEINREB: So last night we -- late last night we emailed the defense a spreadsheet with all of our exhibits. They're not numbered yet, and that's on purpose because there

are a few -- you know, we may rearrange them somewhat or add a few here or there, and we don't want to confuse things with a numbered list that is going to change. However, we also -- the list generally has a description of what the exhibit is, like it will say "Photo of Boylston Street," and then a file name, which is perhaps the JPG file, because the vast number of our exhibits are digital. Whether we present them digitally in the courtroom or print them out and put them up on a big piece of cardboard, we have them digitally.

So all of those digital exhibits are, as we speak -- the process began last night but it's continuing this morning, but are being burned to thumb drives. And we'll produce those to the defense. We may have them before this meeting is over because we know the Court wanted one too.

So it should be possible for the defense to simply consult the spreadsheet, say, Oh, you know, photo of Boylston Street. I would like to see what that is, the file name is X, simply search the directory on the thumb drive for that file name and they'll have it right there.

The only caveat I would say is that there's some of them that we don't have yet either because they're things that have to be scanned and they haven't been scanned or they are files that for one reason or another we couldn't put our hands on. But the vast majority of them are there -- 90 percent of them are there, and we'll supplement them as we have them.

And then to the extent there are physical items, the defense has had an opportunity to look at those. We have identified them -- and because there was a great deal of evidence in this case, and the FBI was trying to track it as well as state police according to what they seized, various numbers were given to pieces of evidence over time. And we've tried to provide the defense with as many of those numbers as possible so that whichever system they find the most convenient to use, they can use.

But to the extent that the defense doesn't know what a particular number corresponds to, we'll work with them. They can just ask us. So it will say something like "BBs recovered from Boylston Street" and then a Q number, Q35, which is what the lab in Quantico assigns to things that go down to the lab, gives them a Q number. There are photos of virtually all of the Q items that have been previously produced to the defense and should be possible just by looking at the photos to see what it is. But if they don't know what it is, and when they know what it is, then we'll figure out a way to get that information to them.

THE COURT: Okay. And associating exhibits with the list of the expected first witnesses? You know, I mean, this doesn't have to be perfect. Things shift around and you decide maybe I won't use that exhibit, I changed my mind, I'm going to use -- but if it's, you know, 95 percent, that would be

helpful.

MR. WEINREB: We could do that, your Honor. We had struck an informal agreement with the defense that the next day's lineup of witnesses would be provided 24 hours ahead of time.

THE COURT: Right. And that -- that doesn't preclude the other -- in other words, that's the last -- I said at the pretrial conference I was surprised that the local rule provided seven days, but I'm thinking about it and thinking about what the defense has said about their ability to follow things. I thought maybe it does make sense to have some advance notice, not with the intention of making it rigid so that if you want to call somebody out of order it becomes, you know, forbidden because you didn't disclose it two weeks in advance. I mean, this is really a practical accommodation to help things go smoothly. And so that if there's some reason why there's some small change or a witness gets pulled -- I mean, you know, it happens too in cases, you decide you don't need them after all.

It's all subject to change. And so, you know, the last minute, "This is what tomorrow's agenda is" would still be helpful, but if there could be some preview so that, you know -- I mean, it tells us to some degree the topics that will be talked about and so on and so forth.

MR. WEINREB: So we don't object to that; we just ask

that it be reciprocal. So when the time comes, we have a lineup of who the defense is going to be calling more than 24 hours in advance.

THE COURT: Yeah, I don't see any problem with that.

MR. WEINREB: We can provide -- it's a little hard to estimate what the first two weeks is going to be.

MR. CHAKRAVARTY: And how fast we'll be proceeding.

THE COURT: Sure. That's right. That's right. But we'll -- it at least separates out six witnesses from 700 whatever.

MR. WEINREB: Yes. Yes. Certainly we can do that.

THE COURT: Just before I forget, on the witness list, could you produce for us a joint witness list that we can attach to the questionnaire? I just don't want to forget that. At some point. Again, actually, logistically it would be good to have it Friday so they could do whatever processing they need to do down in jury. But obviously there will be a witness list attached. Okay.

MR. WEINREB: Your Honor, with respect to the question of who is going to be in the courtroom during the individual voir dire, were you envisioning that we would meet and try to agree on that?

THE COURT: Yeah. See if you have any thoughts about that. Yeah. Now, there's one particular person I'm wondering about, and that's the defendant. Do you expect him to be

present at the individual voir dire?

MS. CLARKE: We don't want the government making an issue of him not being present.

MR. WEINREB: We would request that the defendant be present. The jurors are going to be asked whether they could give somebody the death sentence. They need to see him in the courtroom, this is the person they would be sentencing to death, or they're not going to be able to say whether they can do it or not.

THE COURT: I've done it in other cases -- non-death penalty cases, I've done it both ways. In the Mehanna case, he sat right there while we did it. I've had some child pornography cases where defense counsel have not wanted the defendant there to disturb witnesses.

MR. WEINREB: I also would have a concern in a capital case that if the defendant is not there, that it's going to create an issue for appeal.

THE COURT: Yeah, I think it's a better course.

MR. BRUCK: It is waivable. There's case law. If there's a knowing and intelligent waiver, the courts have accepted it.

THE COURT: You know, I guess I have to look at whatever the relevant law is. I think it is advisable that he be present. I don't know that I can order it against his decision.

Do you think I can do that?

MR. WEINREB: We would have to brief that, yeah.

THE COURT: But, again, that will be for the -- principally an issue for the individual voir dire. I assume he will be present at the preliminary pre-questionnaire questions.

MS. CLARKE: In the jury room?

THE COURT: In the jury assembly room.

MS. CLARKE: That is what we've been told, is that he will be present.

THE COURT: Yeah. Yeah.

MS. CLARKE: Judge, can I ask a question about one of the procedures? It seems like Monday we agree by Thursday, Tuesday we agree by Friday, and Wednesday by Monday. So the Wednesday jurors, which may be jurors we'll never get to, we have the most time to actually work with. I wonder if the Court would consider letting us do Monday on Friday and Tuesday and Wednesday on Monday. It gives us a little more time with the first 400.

THE COURT: Yeah, that's okay with me. That's okay with me. That might be a little less compressed. I think that will pretty much guarantee we won't finish in the second week because if we don't -- if the first day of voir dire -- well --

MS. CLARKE: You would still be doing excusing --

THE COURT: We'll have to see. I don't know. We'll see when we start the voir dire. I mean, we'll, I guess, have

some experience by the beginning of that second week as to how much time the respective players here are involved in what's going on. In other words, our involvement Monday, Tuesday and Wednesday will essentially be for half an hour or an hour twice -- half an hour twice, and then we're out of it while the jurors do their questionnaires.

MR. WEINREB: Still, we actually are with the defense on this one, that 400 questionnaires --

THE COURT: No, that's fine. Friday rather than Thursday is fine.

MR. WEINREB: I would go even further, though, and say that I think the most taxing part of this, from the parties' perspective, is going to be just managing the sheer quantity of data from all those questionnaires, boiling it down to what we really care about and trying to calculate -- figure out who needs to be excused or so on, and that I'm concerned that this schedule is so compressed that we're not going to be able to do it.

And so I guess we would ask that the process of submitting the joint strikes based on the questionnaires begin the following Monday.

THE COURT: Yeah, fine. Let's take the time to do it. That's fine. I guess --

MS. CLARKE: I just wasn't quite that brave.

THE COURT: -- my original hope was that we could do

this all in two weeks but I think that's probably not -- I think we're going to go into the third week, so let's not fight it. So we'll change the dates from Monday, Tuesday and Wednesday.

But it may be that, having reduced the Monday people, we're ready to start asking them questions on Thursday. So I think -- and actually, maybe even, I haven't thought this through at all, maybe even Tuesday.

MS. CLARKE: That's while we're still looking at questionnaires to excuse?

MR. WEINREB: That's going to be a full-time job for quite a few days, looking through those questionnaires. I mean, we have to meet over the joint strikes. Surely there is going to be some disagreement.

THE COURT: Fine. Yeah. Okay. But I think Thursday would probably be the target, then, for the Monday people, because then the list will have been reduced by --

MS. CLARKE: I'm lost on your Thursday.

THE COURT: -- the joint cause.

MR. WEINREB: So it's going to be a week from Thursday.

MS. CLARKE: So the Monday people -- Monday, January 5th people --

MR. BRUCK: Would come back a week Thursday.

MR. WEINREB: A week Thursday.

THE COURT: Correct.
MR. MELLIN: On the 15th.
MS. CLARKE: And we would meet with you on Monday, the 12th, to --
THE COURT: Meet or submit. I don't know that we need to meet if it's going to be joint.
MS. CLARKE: Okay. So the Monday people Monday, Tuesday people Tuesday, Wednesday people Wednesday, start voir dire on the second Thursday.
MR. BRUCK: Which is the 15th.
THE COURT: Yeah. Yeah. Okay. So let's look at the questionnaire. I think I said it about the preliminary instructions, that I'm going to -- that is preliminary instructions to -- orally to the people filling out the questionnaire, I'm going to fiddle with it. There's some introductory language in the proposed form that we may change, again, to more or less conform to what was used in the Bulger case. I like it a little better in terms of how it sets it out. It also happens to be -- I don't know if this is on the docket or not, but it happened to be the form that was used in Phillipos and Tavhayakov. And I think there's actually some value in following what other judges have done in this respect, so that there's some predictability in future cases with this kind of the mass intro to the questionnaire. It's not always a controlling reason for anything but it might be convenient and

where it's -- you know, the substance is going to be the same; it's how it's phrased, is really the issue. So that part will probably change.

So let me just go through and -- I take it that because this is jointly proposed neither of you have any issues with any of the questions anymore?

MR. WEINREB: Are we talking about the instructions or the questionnaire?

THE COURT: The questionnaire.

MR. WEINREB: I actually only had one issue, which is when we were drafting the questionnaire with the defense, it was on the assumption that there would be a -- there would still be some kind of group voir dire process where the standard -- so-called standard voir dire questions would be asked orally notwithstanding the questionnaire, and normally those wind up with the jurors being asked, "Notwithstanding whatever you've just answered yes to, could you still be fair and impartial?" And it's only the ones who say that they did not believe they could be who are actually given follow-up.

So, for example, you know, "Do you have a relative or anybody who is a lawyer or in law enforcement?" and then they're typically asked, "Would that prevent you from being fair and impartial?" And if it wouldn't, there's often no follow-up. But now that it's clear that the process is there's not going to be any group voir dire, we're simply going to have

individual voir dire, those kinds of questions about whether the jurors could be fair and impartial really weren't put into the questionnaire. The questionnaire just seeks the underlying information but it doesn't ask that question. So that's the only --

THE COURT: Yeah, my thought is that since we're going to see everybody and somebody has answered that their uncle was a Boston cop, that's something that can be flagged: Ask Juror No. 35 about his uncle. So I think we can -- and the oral question could be, "Notwithstanding that, would you be able to judge the evidence fairly and impartially without regard to your family relationship?" or something like that. We can put that in. I agree that those questions, as appropriate, should be asked, but I think this process will serve us. In other words, put another way, I think the kinds of questions that in a normal case we would ask the venire as a whole are in here, so I will get the "yes" answers by the questionnaire, and the follow-up can then be on those "yes" answers as appropriate.

MR. WEINREB: Very well.

MS. CLARKE: That makes sense.

MR. WEINREB: That's fine.

THE COURT: So let's kind of walk through it. And I'm going to -- this is on page -- the pagination is different. Is it the same? Okay.

Page 4, the question -- the very first question -- it

may be, and we're going to consult with the jury people about this, there's a face sheet that has the juror's name, and the juror number is going to go on every page. It may be advisable not to have the name in the body of it. What that does is if -- sometimes these have to become public, we could take off the first sheet and have the body later and it doesn't have the person's name. So I think it will work if just the top sheet has the name.

I had a question about Question 4, race. I mean, it's certainly not an issue in this case. I don't know if it's important to ask that question or not.

MR. WEINREB: One of the --

THE COURT: You're going to see all the jurors.

MR. WEINREB: Well, one of the reasons it's useful to have that information is if there's a *Batson* challenge. Without knowing the juror's race --

MS. CLARKE: I think that's right.

THE COURT: All right. Some of these -- some questions we may just want to rework the language. The concept will be the same. Question 6 is an example: "How long have you lived there?" Some of the questionnaires we've surveyed have asked it slightly differently. "If you lived at that location for fewer than X number of years, could you tell us where you lived the prior Y number of years" or something like that. So if somebody just moved to town and, you know, they

lived here for a year, but they lived in Colorado before that, we would want that information. So we may reword that.

Do you want to -- she's kindly asking you if you -- I don't know if you brought a copy of the questionnaire.

MR. CHAKRAVARTY: We don't have a copy.

MR. WEINREB: We were --

MR. CHAKRAVARTY: If it's useful to your Honor, then yes.

THE COURT: Yeah, it might be useful to all of us. Jane can go get you a copy.

Let me see if there are other non-questionnaire things we can talk about until she comes back.

With respect to exhibits, physical exhibits. And I learned that you have a mock -- well, I saw it on the list. A mockup of Boylston Street. Has the defense seen that?

MR. WEINREB: I don't believe so.

THE COURT: Well, you're going to want to use that fairly soon so you should -- any chalks or models, whatever, make sure that you've cleared any controversy while it's still practical to clear it.

Does the witness list -- I'm sorry -- the exhibit list include chalks?

MR. CHAKRAVARTY: It does not include chalks. Some are kind of these hybrids; they could be considered a chalk, but there will be additional chalks.

THE COURT: Right. So that goes for all of them, however many there are? The defense will need a chance to take a look at them.

It's my inclination, unless somebody feels strongly otherwise, that jurors should be permitted to take notes.

MR. WEINREB: No objection to that.

THE COURT: I think by the third week they'll stop, if they last that long. The jurors -- I don't know if you've -- we've talked about this before. We've made arrangements with the Marshals Service for the jurors to assemble at a remote location and to be brought together -- brought to the courthouse together to come into --

MS. CLARKE: And separately from the victims?

THE COURT: Yes. Yes. There may be two locations. They may vary them for security reasons. But that way the jurors will come into the basement of the building all at once. We're sensitive to that concern, about victims and so on, and they'll come upstairs. And they'll never leave the back of the house, as we say, for lunch or anything like that; they'll have to suffer through Gourmet lunches every day for however long. And then they'll leave and go back to where they came from at the end of the day together. Therefore, they won't be mingling with anybody in the cafeteria or trying to come in in the morning the way a normal jury would. So hopefully that will work smoothly. The Marshals have seemed to have worked it out

pretty well.

I think we had an inquiry from somebody in the press about access to admitted exhibits. And I don't know if you -- both sides have talked about that. Typically what's happened is -- first of all, typically in a criminal case, most of the exhibits are government's and so the press typically gets them from the government. Just -- there are going to be people looking for access to exhibits, and I think we can limit it to admitted exhibits, in other words --

MS. CLARKE: Well, certainly the public shouldn't get non-admitted exhibits here.

THE COURT: Right. Right.

MR. WEINREB: So, your Honor, it's been in high-profile cases like this one where the press has a strong interest in the exhibits, the government has typically accommodated them by uploading admitted exhibits to a website where they can download them at the end of the day. Just the admitted exhibits, obviously.

We did discuss this with the defense because in this case there are certain exhibits that are going to be admitted that we think would -- and we know because we've been told by the victims, will cause them tremendous distress if they became public, visions of their children being killed and maimed, and so we don't intend to release those.

THE COURT: That's an issue I think not only with

respect to the feelings of the victims but generally what should be available. I don't know how to draw those lines neutrally and consistent with First Amendment considerations. We'll have to give that some thought.

MR. WEINREB: So what we anticipate happening is we will not make certain exhibits public. We're going to try to -- because we independently, by law, have an obligation to try and make trials as open as possible. We will be erring on the side of caution here, but at a minimum the graphic exhibits of -- certain graphic exhibits and all the ME photos we intend not to release, and what we anticipate is that at least one or more news organizations will probably file a motion with the Court seeking their release. And that will essentially trigger, you know, litigation and eventually a ruling. And that's the posture in which the issue will arise. So that's what we anticipate happening.

MS. CLARKE: Bill, have you thought marking on the exhibit list that you're sharing with all of us the ones you believe should not be made public? Have you made that cut already?

MR. CHAKRAVARTY: We haven't, but I believe we could do that.

MR. WEINREB: We could certainly do that.

MS. CLARKE: We've already agreed to whatever position you want to take.

MR. WEINREB: Yeah. Yeah, we're happy to indicate which ones won't be made public.

THE COURT: Let's see. My notes have a question about witness sequestration during the trial, but I don't know if it's going to occur. But I expect that's what you expect, is that people will be sequestered before they testify.

MR. WEINREB: With the exception of the victims who have a statutory right to be in the courtroom notwithstanding any sequestration order.

THE COURT: Fair enough.

MR. CHAKRAVARTY: We also have --

THE COURT: I've forgotten the number of -- well, I guess there could be an overflow. I'm sorry. I was thinking the courtroom only, but you could see the testimony through the overflow.

MR. CHAKRAVARTY: Your Honor, for case agents and theoretically for expert witnesses, although I don't anticipate expert witnesses for the government sitting through the whole trial, we would ask -- I think there are three case agents in this case. We would ask that all of them be able to -- I don't know how many of them are going to be testifying but we normally have -- in a case of this volume, we need more than one.

THE COURT: Any objection to that?

MR. BRUCK: No.

THE COURT: I think three's an okay number.

MS. CLARKE: Right. If they would identify the individuals.

THE COURT: They'll have to be identified. No doubt about it. Right. Absolutely.

MS. CLARKE: And perhaps -- it seems if the government or the defense wants an expert present, we can notify the other party, and if there's an objection, raise it with you.

THE COURT: Right. So we're going to be very tight at the beginning. I suspect -- I was more involved than I wanted to be in deciding which media outlets would have access to the courtroom -- we had to displease some people. But even then I suspect all those who said we'll be doing day-to-day coverage won't actually, so then the courtroom will loosen up a little at some point after the first couple of weeks probably.

Just so you know, we have a pretty wide representation of media, for what it's worth. We pretty much tried to get all the local media courtroom access, and we have some of the major national outlets, particularly those that are affiliated with groups like *Tribune* papers and things like that, *Gazette*.

In the courtroom there are only three international, we've said could have -- expect to have access regularly to the courtroom. And I forget the name of the outfit but it's from Russia, four initials. I forget what they are. I don't know if it's a TV station or something. And then the BBC and *Agence*

France-Presse where indicated.

Okay. Back to the questionnaire. We've treaded water while you were gone.

LAW CLERK: Sorry about that.

THE COURT: So again, I think similarly, just fiddling with some of the language on 9 and 10, based on what we've seen in other questionnaires, with respect to Question 10, one suggestion I would make as an addition to that, if the person identifies a condition that might affect the person's abilities in some way, whether some accommodation could be made to overcome that problem. I've had, you know, people in wheelchairs sitting in the jury, we've had -- I've had deaf jurors who have sign language, so I think we should ask the accommodation question.

We may expand a little bit a description of the trial in Question 11. Question 13, single, married or living with someone. A couple of the other questionnaires included other possible categories or put the categories this way: Married, single, separated, divorced, widowed, and then the last one was civil union/domestic partner. We don't need to use the expanded list, I guess, just for whatever additional information.

One question we had on Question 14 was whether it was necessary to have the names of the people or it was sufficient, so in the example, just say: Ex-wife, BA in physics, engineer,

or if you need the names. Again, this is just a privacy matter. These people aren't even jurors.

MR. MELLIN: I don't think we need names.

MR. WEINREB: I think we may have added that. It only asked for first name, and it's just for the convenience of being able to refer to -- if somebody has been married several times, they may have more than one ex-wife or ex-husband.

MS. CLARKE: It could be Linda 1 and Linda 2.

(Laughter.)

MR. WEINREB: But it just seemed like we should ask for a first initial. It just seemed convenient but --

THE COURT: It was just a privacy issue, that's all. I don't know if the information content was worth the specificity. You know, I'm expecting at some point these are going to be public somehow, and so we ought to just keep that in mind.

MR. WEINREB: We don't feel strongly about it, if the Court wants to strike that name category.

MS. CLARKE: If we want some laughs we could say, "How do you refer to that person?"

(Laughter.)

THE COURT: On the questions that call for an occupation, we have a lot of jurors who are retired, so we're going to have to address that in some of these questions, maybe just in the instruction. So I'm looking at page 6, we'll

figure out how to do that, but that should -- when we get the juror lists in an ordinary case, often you'll see "retired" and you end up having to ask them, you know, what did you used to do? We'll...

So with respect to the next series of questions about siblings, I guess I understand why there's some interest in that. It seems to be overdoing it a little by asking so many questions. Is there a way to condense, like just ask, Please describe your -- if you have siblings, describe your relationship to them or something like that?

MR. WEINREB: That seems so general that it could elicit non-informative answers.

THE COURT: I guess these seem too stake, S-T-A-K-E. It really kind of goes to what we might expect to be an issue in the case rather pointedly. I'm not sure I like that. So I would suggest that we could condense 18, 19 and 20 into a somewhat appropriate question, and if you want to think about it and submit a more general possibility for that --

MR. WEINREB: I think that can be done.

THE COURT: I don't know how useful 22 will be to us. It seems to be --

MR. WEINREB: That's fine. We proposed that and we'll strike that.

MR. BRUCK: That's absolutely fine with us.

THE COURT: On the next page, the two questions I had

were about 24 and 27. What's the interest in psychology or other sociology and stuff?

MR. WEINREB: The defense has proposed a psychological expert so...

MR. BRUCK: No, we haven't. We've proposed a social worker to narrate --

MS. CLARKE: We have a teaching witness on trauma, if that's what you mean.

MR. WEINREB: I thought Ms. Porterfield is a psychologist.

MS. CLARKE: Yeah, she is. And the proposal is that she would do some teaching on trauma. So you're right.

THE COURT: Well, I think if that's the motive for those, I think 24 is enough without 27.

MS. CLARKE: Yeah.

THE COURT: The answers to 27 in one of those boxes is going to be pretty unreliable anyway. That's like when you go to the doctor and he says, "On 1 to 10 what's the pain level," you're going to get wildly different numbers and you're not going to be able to correlate that.

MS. CLARKE: Right, 15 and minus 2.

MR. WEINREB: I agree.

THE COURT: I think we wanted to add a couple of other options in 28, like a student or, you know, instead of "homemaking" we may say "stay-at-home parent."

MR. BRUCK: The year needs to be updated to 2015.

THE COURT: Yeah.

Thirty, this would call for -- I guess this seems a little too broad to me anyway. It called for unpublished works on something that has nothing to do with the case. I mean, somebody may have written on the training of dogs or something like that, an unpublished manuscript. I don't think we need to know that. What's the interest?

I mean, I agree entirely, for example, with Number 31, which is if you have a web or blog or something like that. That's, you know -- so two problems, I guess, with 30. Published versus unpublished. I mean, published I get; unpublished I'm not sure of and somehow the relation to the issues in the case or something that might be.

MR. WEINREB: I think one of the concerns for both parties is trying to identify jurors who very badly want to be on the jury in order that they can write about it afterwards. So this is a proxy for getting at that.

THE COURT: I see. Okay. That explanation satisfies me.

Number 33: I don't want to know what TV shows they watch.

MR. WEINREB: Actually, your Honor, in that case, we'd ask for some variation on it because one thing the government is particularly concerned about in every case these days is CSI

and other police procedural shows that have the police solving every crime through types of forensic --

THE COURT: Well, from your witness list it looks like you're trying to do that.

MR. BRUCK: Yeah.

MR. WEINREB: I mean, some judges go so far now to routinely give a CSI instruction. No matter what we bring to the table, it's never going to match what they bring on television.

THE COURT: I've given such an instruction in some cases as appropriate, but not every one. I think we can deal with it otherwise. I don't think we need that. I mean, I don't want to know who watches Kim Kardashian, for example.

MS. CLARKE: Although you might be interested. Who knows. It might put some other answers in context.

(Laughter.)

THE COURT: It might, but I think we'll skip that one.

Just, you know, editorial: 35, I would change "ever saw combat" to something like "ever experienced combat" or "participated in combat" or something like that. That's just the editor in me.

Number 39, we've seen a form, and I know it's been used in a couple of the other questionnaires in this court, it's a little more expansive. Actually, it is more like what we actually would say, I think, in normal jury selection, that

you can expect that some of the evidence will come from law enforcement agents, so on and so forth, and it would add a preamble. It would be the substance but it would be...

Forty-one: My suggestion would be to split it into two, it talks about victims' rights and then reform of any laws as if there's a relationship between those two concepts. I think we should split it into two questions.

Going on to 51, past ten years what court cases have you followed with interest.

MR. WEINREB: That, again, I think is a --

THE COURT: The eager beaver?

MR. WEINREB: The eager beaver, precisely.

THE COURT: Okay. So if people say "none," you'll be happy with it, basically?

MR. WEINREB: Yes.

MS. CLARKE: Did we have "what was your first reaction when you received your summons"? We do have that.

MR. WEINREB: Yes.

MS. CLARKE: We had one juror once who answered that question, What did you think when you received your summons in this case, "Larry King here I come." I don't know what that told us.

THE COURT: I think it told you a lot.

MR. MELLIN: It was a request to excuse.

THE COURT: I can imagine.

So 52 and 56 are similar, and I think 56 is the more probative one. One of the things that I'm concerned about with 52 is the list of examples. They're vastly different kinds of things. I don't know. A church, synagogue and mosque is one kind of thing, ACLU and NRA is another kind of thing. I just thought you might get the same information by 56. If you added -- instead of "participated in," you know, "contributed to and supported" or something like that and just have them -- that gets to advocacy groups, which I think is the more important aspect, okay? So we'll strike 52 and maybe beef up 56.

What's the justification for 55? For cause, by the way. I understand what it might be for peremptories, but I'm not sure how you see the connection to the cause excuse.

MR. WEINREB: I don't think there is a connection to a cause excuse.

THE COURT: So I think we should eliminate it. My objective for the questionnaire is to aid us in screening out people for cause; not just to tell you things that you might rely on in deciding peremptories.

MS. CLARKE: So 52 through 55 go out?

THE COURT: No, no. Oh, yes, I guess -- no, I guess if 52 goes out, 53 and 54 would be derivative of that. And for cause purposes I don't see the value of 55.

MR. CHAKRAVARTY: Your Honor, just at the risk of

advocating too much for something, I don't think we care what somebody's personal political belief is; I think the inconsistencies that they might demonstrate with other issues like social advocacy groups, that might raise questions in terms of this person as a whole. And its contextual relationship that at least for me when I saw it, if somebody is a member of the NRA but then they say that they're very liberal, that may be the disconnect that we would want to ask more questions. Not that there's anything inherently wrong about either of those things, but it's just not typical.

THE COURT: No, I think that's too speculative. That example, for example, I have no idea whether that is anomalous or not.

MR. CHAKRAVARTY: No, it's probably not. It's probably not. And if you're a libertarian or something else -- I'm sure it was a bad example.

THE COURT: A minor language issue with 58. Maybe I would -- I thought of asking it as what religion do you currently practice, so it's something more than just a label. Somebody would say a little more about -- I guess maybe that relates to the next question -- or the next couple of questions, so maybe it's not.

But on 62, I thought "experience with" was -- I know you're trying to, you know, uncover useful information and so on. I just reacted against the "experience with." It almost

amplified some sense of alien like --

MR. BRUCK: "Do you know or have interaction with?"

THE COURT: Yeah. What we would suggest is "have substantial interaction" or something like that.

MS. CLARKE: That makes sense. I don't even know if "substantial," but "interaction" will raise the question.

THE COURT: Sixty-three, again, I'd ask slightly differently. I would like -- again, we want to, I think, focus on what might be troubling. In some of the other contexts it's been phrased something like: "Do you have strongly positive or strongly negative views about Muslims or about Islam," and the "strongly" suggesting this isn't just a casual -- like I think they're exotic or something like that. I mean, you want to know if there's something there.

I think I might yield on this one. I thought 65 was slightly redundant of 64, but I guess I don't care that much. I guess this is a time to raise the government's suggested additional one that was not agreed to, about --

MR. WEINREB: Conspiracy of the government, the government being trying to identify conspiracy theorists who think that -- despite how, you know, you pose a particularly pernicious threat to the voir dire process, because I think that conspiracy theorists tend to hold very tightly to their views and yet are very reluctant to reveal them publicly because they know that it exposes them to ridicule.

And this is a case, as I think the defense on motion recently regarding protesters outside the courtroom, acknowledges involves -- has triggered a lot of conspiracy theories out there. And it's particularly concerning to the government that we try to -- that people like that may try to get onto the jury, conceal their views. And this would be a --

THE COURT: Well, if they're going to do that, why would they answer the question truthfully?

MR. WEINREB: Well, I think that the question is phrased -- is enough -- departs sufficiently from the facts of the case that they may feel more willing to answer it than a straight-up question, "Do you believe that there was a conspiracy in this particular case?" It's just a way of trying to flush that out.

THE COURT: Don't you think an affirmative answer to 66 would suggest that?

MR. WEINREB: No, because I think that there are many people -- many, many people who believe the War on Terror is overblown or exaggerated without believing that there is a conspiracy among government and private actors to create phony examples of terrorism. In other words, you can believe that the government is devoting far too many resources to the War on Terror and could be doing -- devoting more to other cases without believing that the government actually creates terrorist events, stages them in order to create support for

it.

THE COURT: But wouldn't a person who believed the government conspiracy theory think that the War on Terror is overblown and exaggerated? So, again, assuming a truthful answer -- an untruthful answer is another whole problem, but I don't know that the question --

MR. CHAKRAVARTY: If you got a yes answer you could follow up on it here. What do you mean by that?

THE COURT: Yeah, I don't think I'm inclined to follow that.

MR. CHAKRAVARTY: I think one of the concerns was some of the conspiracy theories is that the -- it's not necessarily a terrorism-based conspiracy; it's just a distrust of government or what happened post-Ferguson, a lot of the conspiracy amongst police officers and the law enforcement, particularly in light of the Todashev shooting and the interrelationship between those conspiracy theorists and the Marathon bombing conspiracy theorists, there's a lot on the blogasphere that is divorced from the War on Terror kind of --

THE COURT: Is there any other question about distrust of the government?

MR. WEINREB: I don't believe so.

THE COURT: I think there might have been -- was there one in the Phillipos? I thought I saw that someplace. I don't remember it in this draft, actually.

MR. MELLIN: Question 48 on page 13 says "If you have strongly positive or negative views about law enforcement officers, please explain."

THE COURT: That's specific to law enforcement and that's the model I was thinking of for Muslims or Islam, strongly positive or negative. So prosecutors, defense lawyers, maybe there would be a place to add something about trust of the government, or I don't know how you'd formulate it. Maybe you can suggest that. But I think I'd --

First, I think I agree with the defense view that, again, assuming a truthful answer, a person who was a conspiracy theorist would think the War on Terror was overblown, it's a specific instance of what might be a broader view of government misbehavior, but it could also be followed up on for the specific question.

But I guess I wouldn't object to a more general question about: Do you generally think the government is trustworthy or not, or do you have strong views about something -- something like that. We could work out the proposed language. Maybe you could submit something. I think that's a fair question to try to get people who think the government's evil.

In 67 and 68, I would like to just add the visual signal by underlining the word "legal." I think there's so much talk of illegal immigration that people may see that

phrase and read it as illegal immigration. So I want to emphasize we're talking about legal immigration: "Do you have any problem with legal immigration?"

Question 70 in the Phillipos -- well, not Phillipos, I guess Tavhayakov case, there was a questions, it said the defendant was born in wherever he was born, Kazakhstan, and is of Russian descent, and then it said, "Do you have any beliefs, attitudes or opinions regarding Kazakhstan, Russia" -- it listed them. It was basically the same question but expanded a little as to why you're asking me this question. They're not going to know why you're asking about Dagestan. So I think we just save the preamble by leaving it in that region.

Question 71 and 72: I don't know anybody who would answer Question 71 "no." It's in the nature of being a teenager to be influenced by others. So I'm not sure how helpful that one is.

The next one, I wonder whether you need to say "positively or negatively." I could imagine that going both ways. But I guess maybe that's a follow-up question? I don't know. So can we live with just 72?

MS. CLARKE: This was a government --

MR. WEINREB: Yes.

THE COURT: Okay. Obviously, these will get renumbered because we're eliminating...

Now, I'm on 18 -- 79. I guess I see this as a

question that will cause trouble because it will be so unfocused I don't know if -- I mean, I guess it's one that might get very interesting answers. Maybe it's a trigger to follow-up.

MS. CLARKE: I think it is. I mean, you know the point.

THE COURT: I expect you'll get answers which have untrue facts. I mean, something everybody would agree was untrue.

MR. BRUCK: Or very prejudicial facts which are not going to come into evidence. People know everything about this case, it's been reported, whether it's true or not, whether it's admissible or not.

MS. CLARKE: You might want to add a few more lines.

THE COURT: You would have to. I guess that's one of my concerns. But if you want to live with it -- this is a question that we'll probably be asking every voir dire person.

MR. FICK: I think it helps to flush out at the top whatever anybody said. No matter how they impressionistically treated it, it's useful to trigger a follow-up.

MR. WEINREB: I suppose it could be amended to say what are the, you know, three or four most memorable things.

MR. BRUCK: That will reduce the value. Everyone will say the same thing: Bombs went off at the Marathon. A police officer was killed.

MR. WEINREB: I guess my concern about it is that -- is the opposite of an overlong answer which is getting a partial answer, you know, that a juror may know ten things about it, and if you only put down two of them, does that give you a fair picture?

MR. BRUCK: Well, that's a probe and it's for follow-up.

MR. CHAKRAVARTY: We could end up following up on every fact asserted. Then that would be -- I'm not sure how constructive that would be. This would take forever with every witness.

MR. WEINREB: Yeah. And if the question is designed to determine whether the jurors have been exposed to pretrial publicity, that might have affected their ability to be fair and impartial, but I do think that the case law of the Supreme Court ruled it is not necessary to ask jurors what the pretrial publicity is to which they have exposed; it's only possible to ask whether they can put it aside and be fair and impartial.

And I am concerned that this one question will turn out to be the question that dominates the entirety of voir dire of the individual jurors unnecessarily.

THE COURT: Yeah, I guess that's my concern as well, I guess. There will be sort of unmanageable data, I guess is my concern about that. I think that the preconceptions, and so on, we deal with in a series of other kinds of questions -- I

think we're better off without this one as a narrative.

MR. BRUCK: We would -- I think our feelings about that would be affected by the extent to which there will be questioning on this exact issue in individual voir dire where jurors can --

THE COURT: I think one of the common questions is going to be to a juror who answers to 83A, that she thinks Dzhokhar Tsarnaev is guilty, and then we're going to have to ask regardless of that idea that you have now, would you be able to hear the evidence and judge it fairly and perhaps change your mind if the evidence warranted that? We'll do all that with these other questions, I think.

MR. BRUCK: But it's true that there is a 5-to-4 Supreme Court decision that says it does not violate due process not to ask for content, *Mimin versus Virginia*. It's very much the minority view among courts, state and federal, in the country. And it tends to, in a case like this where you -- where you have really no ideas what the juror may have swirling around in their head, it makes the juror the judge of their own impartiality in the end not to be able to --

THE COURT: To a large extent that's true.

MR. BRUCK: I'm sorry?

THE COURT: To a large extent that's true, the juror is ordinarily --

MR. BRUCK: But the Court can evaluate more

realistically when you know what it is the juror and how much --

THE COURT: I think the other questions will help us do that. I think this is -- I think we can do without 79. I mean, I think what we touched on is the biggest issue in voir dire, obviously, because there are going to be a lot of people with preconceptions. As a matter of fact, you may even wonder about people who have a preconception in the other direction, whether they pay attention to anything in the world. If they say, no, I know he's not -- that's another -- maybe touching on that -- so we're going to get a lot of "yes" answers to 83A.

MR. MELLIN: Your Honor, Question 78 talks about how much have you been exposed to.

THE COURT: Right. So I think we'll do okay with that.

With respect to 83, I think I would like to add to the menu for each of the subparts a third option, which is "not sure" or "undecided" or something like that: Yes, no, undecided.

MS. CLARKE: Judge, that raises our --

THE COURT: Yeah, your -- I have it someplace here. Anyway...

MS. CLARKE: Excuse my fingerprints on that.

THE COURT: Yeah, this is the question that added the fifth opportunity, whoever committed the crimes. So I take

it -- take from its absence in the joint draft that the government objects to that?

MR. WEINREB: Yeah, we filed an opposition to that.

THE COURT: Okay. Let me get those.

By the way, let me -- because it came up, Cheryl is another stenographer. She's going to be splitting time with Marcia. And she just wanted to get familiar with the vocabulary by sitting in.

MS. CLARKE: I think I passed both of those because we had to file a supplement --

MR. WEINREB: It's possible that the government addressed it in the context of the --

THE COURT: The memo on voir dire.

MR. WEINREB: Exactly, our response to the defense memo on voir dire because I know we did discuss the so-called specific *Morgan* questions there. But that would not necessarily have addressed the whoever question, although we do object to that question.

MR. BRUCK: That's a publicity question.

MR. WEINREB: Right. It's sort of a combination.

(Pause.)

THE COURT: Well, so there are two questions that the defense proposed: One was the one -- let me just pause again to add an E, which is whoever committed the crimes should receive the death penalty. The second one is a new question,

death penalty is only appropriate -- is the only appropriate punishment for anyone who has, A, murdered a child, deliberately murdered a police officer. Those are case-specific, you think?

MR. WEINREB: Those are, although --

THE COURT: So is your objection more to the first one than the second one?

MR. WEINREB: Your Honor, our objection is to -- it's to both of them on that the grounds that they're both, in our view, including the first one, classic so-called stakeout questions, which ask the jurors to stake out a position on the death penalty before they have been instructed that there is a process that is designed to guide their discretion. It's a legal requirement that they follow it, that they will hear evidence, not just of what they've already heard, may have read or seen in the press, but they will hear evidence of both aggravating factors and mitigating factors and that they will be required to weigh those to make a decision.

If you ask them, based on everything you've seen or heard, do you believe that anyone who committed the crime deserves the death penalty, that essentially -- anybody who is asked that, who all they knew was that there was this bomb that went off -- bombs went off at the Marathon; people were killed; it may have been a terrorist act -- many people might say yes to that. And then later on, What if you were told that this

mitigating factor and that mitigating factor and this other mitigating factor, then they might say, Then that's another story. Then maybe not necessary they should receive the death penalty. But now you've got inconsistent answers. They've said one thing in response to written questions, and they've said another thing during follow-up.

The Supreme Court has held that inconsistent answers are evidence of substantial impairment, that a person is substantially impaired in considering either mitigating factors under *Morgan* or aggravating factors under *Witt*. We think that it is a big mistake to lard the record with all of these inconsistent answers which are bound to arise once -- if the jurors are first asked the question in this very one-sided manner and then asked it on follow-up in a much more balanced and fulsome manner, because it will raise a question about every strike for cause or failure to strike somebody for cause, whether it was appropriate or not.

So we oppose all of these such questions and think that the Court could ask a -- we're not insensible to the defense's desire to know whether the jurors could, in fact, consider mitigating factors, as they're required to do under *Morgan*, given the aggravating factors in this case. We're simply asking that the question be asked in a balanced way where the Court could, for example, say to the jurors, If you find the defendant guilty of a capital crime, there will then

be -- if the jury finds the defendant guilty of a capital crime, there will then be a second phase of the case where you will hear evidence of aggravating factors and mitigating factors. Aggravating factors are factors the government believes justify a death sentence; and mitigating factors, the defense believes, justifies a life sentence. And then the specifics could be introduced.

So the government will seek to prove to you, among other things, that -- as an aggravating factor, that the defendant murdered a child, murdered more than one person during the course of the crime, murdered a police officer, deliberately committed murder during an act of terrorism. And the defense will seek to prove mitigating factors, among other things, that the defendant was 19, that he was influenced by his brother to commit the crime, that his dysfunctional family made him vulnerable to that kind of influence. Would you be able to balance any aggravating factors you found proved with any mitigating factors you found proved in making a death-penalty decision or a sentencing decision? And that way the specific aggravating factors are presented to the jury in a context where they understand what their obligation is going to be down the road.

MR. BRUCK: Well, first of all, I think we need to separate the two issues. I think both questions are critical, but they are about different things. Our proposed No. 83 is

really a pretrial publicity question. It is not disqualifying in and of itself, but it is certainly extremely important to know if, on the basis of what a juror has heard outside the courtroom, the only remaining question in their mind is whether the government charged the right person and, if so, he should get the death penalty.

Now, that is a -- nobody could think that an impartial juror could be seated in that frame of mind. That is clearly a question that goes to a bias. We are not saying that an affirmative answer to that is the end of the inquiry, but it most certainly flags something that the Court would want to follow up on, which is true of most of the questions on the questionnaire, except this one is about something that's really important.

If the task is could a juror be rehabilitated, could a juror still be impartial despite an answer, we might as well not have a questionnaire because almost every question flunks that test. That's not the test. This is an important thing to know.

There will be jurors who say, Nothing could change my mind. This case -- this crime deserves the death penalty, period, based on what they've heard, but they're willing to make sure that they've got the right guy. So that's 83, and it goes to exposure to pretrial publicity much more directly than a lot of other questions that were on the questionnaire.

Number 100, our proposed, we don't at all agree that the Court should pretry the case by listing aggravating and mitigating factors and getting the jury to say if they could go either way depending on family or brother or someone. That is stakeout. That is a pretrial of the case.

We're talking about something very different. The *Morgan* v. Illinois inquiry is whether or not, where the government charges a crime, the juror would always vote for the death penalty upon conviction of that crime. And we are referring to the actual charges that have been brought by the government. That is the basic *Morgan* inquiry.

Now, the juror will have -- will -- it will be explained to the juror about aggravation and mitigation before there's a ruling. Mr. Weinreb says, Well, it would be a mistake to put things on the record that would create a problem. As their briefing makes clear, the appellate -- standard of appellate review on these rulings is extremely differential. If there's conflicting evidence, 99 times out of 100 the appellate court defers to the way that the trial judge resolved the issue.

I think what the government is really afraid of is finding out what jurors actually think because there are a lot of jurors who have a categorical view, which is, if you kill a child, you get the death penalty. They are not relativistic about it. They have fixed core moral values that -- they don't

vary. And there's nothing wrong with that. But it is a disqualifying bias under *Morgan* v. Illinois because we have a discretionary sentencing system in this country, and it's required by the Eighth Amendment. And a lot of people reject that. And the point of this process is to find out whether such a person is the juror before you.

So these are critically important questions. They flag an area for follow-up. The fact that someone, again, says this doesn't mean the inquiry is over. It means there has to be the inquiry. If we don't know that a juror holds this view, we're going to miss inquiring and really testing, and we weren't really being able to evaluate critically whether this juror is in the eye-for-an-eye category. With respect to the charges in this case, which is the only really legal question, it doesn't matter if a person could vote for life in some other kind of capital crime that is not charged in this case. That doesn't make them a competent juror.

So that's why these are not stakeout questions. They are questions that go to this basic question of impartiality. And we think, at this preliminary stage, this is valuable information. We've cited the very, very troubling findings of the National Capital Jury Project, which show that huge percentages of jurors go through the entire process, sentence people to death, and then tell an interviewer later that they thought it was mandated by the law. It wasn't really

discretionary. We need to get at that to make sure we identify jurors who take that view. So that's why we think that there's nothing at all wrong with this question, and it ought to be on the questionnaire.

MR. WEINREB: Your Honor, if I could just respond briefly. So the record is clarified, there already is, in Question 83 in the questionnaire, this proposed 83, just Subsection (e) that would add something. We -- frankly, when we were talking to the defense about this -- none of these Questions (a) through (d) are legally required to be asked, and there's case law holding that they not be asked. We thought it was a reasonable compromise to allow (a) through (d) to be asked but that (e) took the inquiry a step too far. I just want to make that point.

And, secondly, I also want to reemphasize the point that the government is not proposing that the jurors not be asked whether the fact that a child -- the government will seek to prove as an aggravating factor. It's not an element of the crime that a child be murdered. It's not an element of any of these crimes. It's not an element that a police officer be murdered or any of those things. These are aggravating factors. They're -- and what we're not -- we're not proposing that jurors not be asked whether, in the face of those, they would be unable to weigh aggravating factors or mitigating factors.

We're only objecting to the manner in which the question is asked. In our view, it's simply that it should be asked in a manner that lets the jurors know that there will be evidence of mitigating factors -- that these are aggravating factors. There will be evidence of mitigating factors and that they will be required to weigh the aggravators and the mitigators. And the question that should be asked is whether they would be capable of doing that. That is what *Morgan* held, is that the jurors have to be able to give consideration to mitigating factors in order to be fair and impartial.

THE COURT: Okay. Well, I think, for these two questions, I want to go back to the case law a little bit before I resolve that. So we'll let you know about that. I understand the arguments.

With respect to 84, the only concern I have is it doesn't distinguish -- this is about expressed opinions. It doesn't distinguish between casual or trivial expressions and more deeply-held ones. And so the contrast, for example, the difference between somebody who mentions something relatively briefly or casually to a family member or something like that, that they may be watching TV with, as opposed to somebody who's a loud mouth broadcasting their views to the world. I mean, the second one we really want to know about. I'm not sure we'd need to know about the first one.

You know, in a case where people -- large numbers of

people will know about the case, they are likely to have said something to somebody about the case. I'm not sure we need to know all of that. But the person who feels so strongly that he grabs people by the lapels and tells them is a different story. I don't know if there's a way to target that.

And we do -- in next questions -- or the next question, I guess, have a particular indicator of strongly-held views, that you went public with them in some way, maybe that word worked into 84 maybe. I don't know. I'm just commenting off the top of my head now, whether we can distinguish between public and private conversations or outside the context of your family. Even people in the workplace are likely to have said something to each other. We're going to be trolling for too much information.

MS. CLARKE: Would you want to say, in 84, If yes, how often have you expressed that opinion?

THE COURT: I guess that's one thing. I mean, you could -- you could ask something like, Under what circumstances, or something like that.

MS. CLARKE: I think that's what we were trying to get at. If yes, please explain, but --

THE COURT: Yeah. We could ask them to explain.

MS. CLARKE: Please explain how often and under what circumstances.

THE COURT: Yeah. We could do something like that.

MR. WEINREB: This was a defense proposed question. We don't have any stake in it, so whatever --

THE COURT: That might be enough to narrow it down.

MR. BRUCK: Right. And it's a question for follow-up.

MR. WEINREB: The only thing we'd ask, your Honor, which I think we overlooked the first time around, it should say, If you answered yes or no to any of the above because --

THE COURT: Yeah. I think that's right.

MS. CLARKE: If you answered yes or no -- if you answered the above questions --

THE COURT: If we --

MS. CLARKE: Maybe it's just, Have you expressed --

MR. CHAKRAVARTY: No, because the Court is going to add in --

THE COURT: There will be a third option because I'm sure --

MS. CLARKE: You're right.

THE COURT: We're going to need more lines.

MR. CHAKRAVARTY: If we're saying, Please explain, without distinguishing qualitatively whether it's one of these trivial expressions or not, then we are technically asking them to explain even the trivial, offhanded comments. Should we make a qualitative qualifier, Please explain any substantial conversations?

THE COURT: You could -- perhaps you could add, Have

you expressed or stated your opinion at length to anybody else?

MR. BRUCK: Not many people would say yes to that.

THE COURT: I'm just trying to think of measures that could make it a more prominent thing. "At length" is one or "repeatedly" or "on multiple occasions" or something like that, which would also suggest intensity of thought.

MR. FICK: That just seems naturally the kind of amorphous thing you'd get in follow-up rather than the question. At different cutoff points, you would be just sort of eliminating people from an answer or excluding an answer. People's self-described scale of substances is higher or lower. There's no way to gauge that.

MR. BRUCK: Maybe one solution -- we haven't discussed it, obviously -- is just to take out the "please explain" and have it be a follow-up. Just get the juror to tell us about it when we talk to them. That will quickly solve the problem there.

MR. WEINREB: My personal feeling is that jurors are not going to -- this question is going to be hard for them to answer. They're not going to remember whether they've stated -- most people. There may be some who have felt strongly about it and broadcast their opinion far and wide. But did any of them mention it to their spouse or to a friend? They may have trouble even recalling and --

MR. BRUCK: We just felt that, "Have you expressed or

formed an opinion," is one of the classic inquiries on voir dire. It's -- and this is expressed. There's great insight to that.

THE COURT: As it relates back, it is a very specific opinion. It's an (a), (b), (c), or (d), right?

MR. BRUCK: Right.

THE COURT: And possibly (e). Maybe that should be more evident. In other words, it's not just, Have you talked about this case or the facts, you know, with your wife or people at the workplace. It's, Have you expressed the opinion you've checked specifically?

MR. BRUCK: Sure.

THE COURT: Maybe we can rework it to make sure that's what was expressed.

MS. CLARKE: That makes sense.

THE COURT: People undoubtedly talked about the case. If somebody has never said, I think he's guilty, 83(a), then they haven't expressed that -- they haven't expressed that opinion.

MS. CLARKE: That's what the question is getting at because it's referring back to --

THE COURT: Right. So maybe we have to --

MR. MELLIN: Your Honor, may I make a suggestion? That we take out (a) through (d), and then at the end of the 83(a), where it says, "Have you formed an opinion," we continue

on and say "...about the defendant's guilt or the appropriate punishment in this case?" And then let the jurors answer that. And we can then say, Please explain. Then let the jurors then explain what their answer is without us directing them necessarily to (a) through (d). And I think that accomplishes what the defense is looking for, is people that have an opinion and what that opinion is.

MR. WEINREB: I would second that because I think there are a lot of people who may feel, for whom the answer may be, Well, if everything that I may have heard about it is true, then he's guilty. But people don't make those kinds of fine distinctions when they're being asked questions.

THE COURT: Particularly non-lawyers.

MR. WEINREB: In a questionnaire kind of way. I think this question, again, is another one that's going to create more trouble than help because these are questions obviously of -- that -- where both parties are interested in the answers, but the manner in which they're asked can both lock a juror into something that they don't really believe and seem to create inconsistent answers. So I think a more open-ended one actually would be a better one and that this also may be something it would be best to hear face to face rather than have them try to write it out.

THE COURT: As an alternative to that, in the preamble to 83, suppose that at the end you said, Have you formed a firm

opinion as opposed to a casual impression? And then you could ask -- then maybe ask the four questions.

MR. FICK: Again, I think we would lose a lot of valuable information because you never know how any particular juror is going to gauge their level of firmness, which is what the question is calling for. What we want is the opinion generally for follow-up without having to sort of have no control group or denominator against which to gauge the level of firmness the juror is assuming in their answer.

MR. BRUCK: That's right.

MR. WEINREB: I think -- the Supreme Court's cases on this, I think, have taken a very practical approach to this issue. They've said repeatedly, in a case that's made the news, Every intelligent person is going to have formed some kind of opinion one way or another. It's not really -- I think that simply asking, Have you formed an opinion and what is the opinion, doesn't get at what this question is designed to get at, which is, precisely how firm is the opinion. How open are you to actually hearing evidence? Can you distinguish between what you hear outside of the courtroom and what you hear inside of the courtroom? So that all of these checkboxes and these follow-up questions on the questionnaire are not going to -- it's going to be more noise than signal.

MR. BRUCK: I don't think we should lose sight of the fact that this is a questionnaire. This is not the voir dire.

This is trying to screen broadly in a very efficient way to know what to flag. And giving people an exit ramp from declaring the most basic answer seems like a mistake.

THE COURT: Okay. Well I understand the position. I want to think a little more about it. We'll leave that to resolve as well.

MR. BRUCK: I hate to work backward but there's one last point. As far as "undecided," if there is going to be a question, Have you formed an opinion, yes or no, and then to give an "undecided," well, "undecided" means you haven't formed an opinion, so it seems internally inconsistent to have an "undecided" box. Jurors should find that confusing. If there's another way to do it, fine, but not in the format we have now.

THE COURT: I think, strictly speaking, you're right. But I think the jurors would not be that strict about it. And if they -- we're not -- I think that gets to my firmness issue. If they had not firmly decided it, then they would signal that by saying "not sure," maybe. How about "maybe"? I don't think so. Okay. We'll deal with those.

I think 91 is just a reformulation of the language a little bit.

We were thinking of suggesting for 93, again, to get the strength of belief, to ask whether -- something like, Do you have a strong opinion about the appropriateness of the

death penalty in general, or something like that, pro or con, or something. What are your views on the death penalty, is a little squishy, I guess. If somebody is more or less ambivalent, they could tell us that, if somebody has a strong view. But, you know, I think we get better answers in the next two questions, which, I think, are the real good questions about the death penalty. I think they're very nuanced. Certainly, No. 95 is. I think it gives a broader range.

MS. CLARKE: Judge, one thing 93 does is it starts the juror thinking about it.

THE COURT: Right. I guess I don't so much object to a tee-up question, but I think it should be a little bit more about strong views as opposed to --

MS. CLARKE: Many instances you'll find people that have never really thought about it.

THE COURT: I think that's probably right.

MS. CLARKE: To say, Do you have a strong view about it?, of course not. I haven't thought about it. So if you prompt them by saying, What are your views about it?, it prompts me to start thinking about it. I haven't thought about it. We'll get answers like that, I strongly favor; I strongly don't favor. You sort of let them off the hook with the strong views. That's one of the purposes of the voir dire in a capital case, is to sort of surface that. So I would urge you to leave it vague because you're right. The next couple of

questions do sort of focus it more.

MR. MELLIN: Your Honor, I think it's fine. It is -- I agree with the Court that 94 and 95 really get to the meat of the matter, but 93 is typically one of the questions we have in these questionnaires. It does get them to thinking.

The reality is, your Honor, even after filling out this questionnaire, they'll come back during the individual voir dire and say they've thought about it a little bit over time. And some of the answers they gave in voir dire they would disagree with now having had some time to think about it. I think it's fine in there if the defense wants to have it in there. I don't think it really elicits the information that ultimately we're both going to be relying on.

THE COURT: Could you preface it with a conditional? If you have views about the death penalty in general, would you tell us what they are?

MR. MELLIN: That's fine.

MR. WEINREB: That's fair.

THE COURT: Okay. So I guess I'm wondering how many of these questions we ask. I have some concern about all the rest, 96 through 100, as listed here. What does a change of view tell us? It obviously could be in either direction.

MR. BRUCK: Right. It gives -- I think it gets to the strength with which people hold a view, if it's really based on something they've heard or --

MS. CLARKE: Experienced.

MR. BRUCK: Experienced, yeah. It could very well get to something which --

THE COURT: I'll buy that.

The next two sound like final exam questions for Criminal Justice 101. I don't -- I think they're unnecessary in light of the previous questions.

I'd like to rephrase 99 if you want to have it. I think you might ask something like, If your views about the death penalty have been formed on the basis of your religion, spiritual training, and so on, please explain, something like that. The way it's phrased is, What does your religion teach, for example, people are going to have wild answers about what their religion teaches, many of them wrong probably.

MR. WEINREB: If your views are religiously based -- I guess it's not just religion. Based on religion, philosophy or spiritual training, we agree with that.

THE COURT: The No. 100 here, it's -- it seems to be suggesting that any case, no matter how similar or dissimilar to this, can be rated. In other words, I don't -- a person might think the death penalty is imposed too often, generally, but be indifferent as to a view on this particular case. I'm not -- I guess maybe it's not going to be useful information. I'm not sure how harmful it is to ask. I just don't think it's going to tell us very much. This is in general again, and

that's a lot of territory.

MR. BRUCK: Well, too seldom there's a way of reading the comments to what people -- articles about this case in the paper, you realize there are people out there who, Kill them all and let God sort it out, is their justice philosophy.

MR. WEINREB: We don't have strong feelings on it.

THE COURT: Okay. 102, I think I agree with the substance. I don't know. We're thinking about fiddling with the language. If nobody has a real problem with it -- it asks two questions. We were thinking of letting them -- phrasing it more generally. "As a result of any possible verdict you might have," you're kind of opening the universe. What we're getting at is, are You going to feel pressured to come to a particular conclusion by what people will think?

MS. CLARKE: Can you go back to your hairdresser and your dentist and your doctor and say, Yeah, I voted for --

THE COURT: As the question reflects, for either direction. I guess the question is: Do you ask it more generally, or do you put the two directions in there? I guess I'm not -- if everybody is content with that, we'll leave this.

MR. WEINREB: We're content.

MR. MELLIN: That's fine.

THE COURT: 103 and 104, I think the preamble should rather be, If you found Mr. Tsarnaev guilty and you decided the death penalty was appropriate..., it kind of presumes guilt.

MR. WEINREB: Yes, that's a better question.

MS. CLARKE: Good thing somebody is reading this.

THE COURT: 105, we might just fiddle with the language.

Then there were a bunch of questions that weren't covered that we have seen in some of the other forms. I just want to mention some of them, see what your reaction is. Some of the other forms have asked specifically whether the juror will be able to follow the law as given by the judge. I don't know. That's kind of a -- I know they've done it. It's kind of a wishy-washy answer. Everyone is going to say yes, probably. I don't know if we need that.

I would typically, in a general voir dire and a 40-person venire, ask if the jury had any difficulty with faithfully applying the burden of proof, presumption of innocence, and proof beyond a reasonable doubt. Some of the other questionnaires have had a question about that.

MR. WEINREB: The government's view is that asking the jurors whether they could follow particular instructions to the exclusion of others is not fair or appropriate because the case law emphasizes the importance of taking the instructions as a whole, following them all as opposed to particular ones.

THE COURT: Yeah. But, as I said, that is one I generally would ask the group in the courtroom, if anybody has any reservation. I hardly ever get an affirmative answer.

MR. WEINREB: We certainly don't oppose that.

THE COURT: It's kind of a didactic question, too, just tell them this is what will be expected of them.

MR. BRUCK: In this case, we are signaling the jurors to give the expected answers, a civics lesson. This case is so different in terms of what people have been exposed to, the emotional turmoil surrounding the case. It just seems like we ought to get the jurors unprompted and not signal to them what they think.

THE COURT: Usually, it's the defense that asks for that question, but you don't want it?

MR. BRUCK: Uh-umm.

THE COURT: There are other similar ones, but I gather from what you've said, you don't think -- some of the others have asked, Will you abide by my instructions not to read the newspapers and look on the TV and --

MR. MELLIN: Your Honor, maybe I'm misunderstanding. Is the Court not going to give those general instructions to the jury?

THE COURT: They will be told this. This is whether we'll ask them whether they will have any difficulty following it. Maybe the better course is to tell them and look sternly at them and say, I expect you to do that.

MR. WEINREB: The government would be in favor of reminding the jurors in as many ways as possible once they're

sworn.

THE COURT: We'll do that constantly during the case.

The other question I've had is a specific question about -- or an opportunity to note which of the prior questions they might like to add something in private about. I don't remember whether the preliminary instructions do that.

MS. CLARKE: I think we indicated --

THE COURT: The ones that --

MR. WEINREB: I think in the very beginning.

THE COURT: The ones that we would replace, it will do that. It will say, you know, Answer -- If you don't want to answer the question at all because it's sensitive, just indicate that. And then at the end, there are two ways of doing it. You write "private" or something in response to the question, and that will be a signal, or there's a catchall question like this at the end: Are there any questions as to which you have something confidential to say that you don't want to write on the paper?, or something like that.

MS. CLARKE: Sure.

MR. WEINREB: That's fine.

THE COURT: Finally, I don't know whether this -- we didn't see this in any of the others, but it's a possible question. Because we may be dealing with people who have tentative views, to assess perhaps their susceptibility or receptivity to moving off those views, I was thinking of a

question something like, Have you ever changed your mind about an important decision in your life? If so, could you give an example? And then ask, What was it that led you to change your mind? Additional information? Reconsideration of the pros and cons? Opinions of others? Other? I don't know. I've never seen it. I sort of made it up. But it tests something we're interested in, and that is rigidity.

MR. MELLIN: That's fine.

MR. CHAKRAVARTY: We did that in the Munyenyezi case, which was from New Hampshire. It was a mistrial and a hung jury because of rigid views. So in the second questionnaire, we particularly said that on that. So we got to a verdict. There's no artful way of saying that that's going to capture everything, but it's just to start the discussion. It will prompt very probing follow-up questions about which they may feel sensitive about.

MR. WEINREB: The government is in favor of that. I think that's a very useful question.

MR. BRUCK: The question would stop there. It wouldn't go on to ask more about whether that process could -- the juror would --

THE COURT: No, the question wouldn't. But, again, I expect we're going to have that discussion in the individual voir dire with just about everybody, you know, Will you be able to decide this on the facts that you have yet to hear in the

course of the case rather than on pretrial notions or whatever or tendencies? All right. We'll stick it in someplace. I'm not sure exactly where it goes.

MS. CLARKE: P.S.

THE COURT: Right.

MR. BRUCK: Maybe a stupid question. But what are jurors going to have to write on as far as -- are they going to have clipboards?

THE COURT: They get a steno pad. There's one in the corner like that, with a pen on it.

MR. WEINREB: Did you mean in the jury box or filling these out?

THE COURT: I'm sorry, filling these out. That's for the jury box. I'm sorry.

MR. BRUCK: They will be sitting in chairs?

THE COURT: No. They'll be sitting in armed chairs, like a classroom.

MR. WEINREB: They're pretty thick.

MS. CLARKE: Will they have a table?

THE COURT: Downstairs in the jury assembly room.

MR. BRUCK: They have chairs?

THE COURT: They have clipboards then. They'll have clipboards. I think I remember Jim telling me that. Yes, I'm pretty sure. If they don't have any, we'll go out and get some.

MR. FICK: In the jury assembly room, where will the parties and the defendant be seated?

THE COURT: So the room is reoriented. If you think of it, as you walk in the glass doors, they'll move, I guess, the podium against the far right wall towards the back towards where you can go back into the offices of the jury room. And there will be tables set up there for counsel on both sides and the defendant and me for the preliminary instructions, introducing people. One of the advantages of that is that there's a way to get the defendant into the --

MS. CLARKE: In and out.

THE COURT: -- in the back, and he's seated right there, and the marshals can be more or less out of sight.

MS. CLARKE: And not shackled.

THE COURT: And most of the chairs will be facing straight onto that for the room. I think, because of the quirkiness of the dimensions of the room, there's actually a wing that faces the other way. But, basically, they will be in the back by where you would come if you came through the jury clerk's office. And it takes -- 200 people fill that room.

We will allow the press to be -- and I guess the public -- to be in the area outside the glass wall so they can observe but they won't -- nobody will be in the room.

MS. CLARKE: What about contact with the jurors as they leave? Is the press going to be instructed or they won't

be instructed?

THE COURT: The jurors are going to be instructed, for sure, that they're not to talk to anybody. I don't remember whether the decorum order does that. Is that filed yet? No. We've been working on so many drafts. As a matter of fact, I haven't shown Jane. This is one of our drafts.

MR. WATKINS: We have a lot like that, too.

THE COURT: I like it a lot.

MR. WEINREB: We appreciate that.

MS. CLARKE: We would like it to say "motion granted."

THE COURT: Anyway, our decorum order addresses that and tells them there will be no contact with the jurors, including anybody, of course, who has a list.

MS. CLARKE: I don't think we're your problem.

MR. WEINREB: For what it's worth -- I don't know if the Court is aware of it, but it's been our experience at the U.S. Attorney's Office that the local press and even the national press tend to be very good at respecting decorum orders. They're old hands and they understand what the rules are. The foreign press very often doesn't understand the rules and seems to find it impossible to fathom them so -- just as a -- for what it's worth.

THE COURT: That's good to know. I don't think we're going to have that much foreign press as a regular matter. It will be in and out. I'm trying to think from memory. We only

put three of them in the room. There are a bunch of others. There may be a dozen foreign -- total foreign media people that have signed up for credentials. I don't know. Do you know, Paul? Do you know the answer to that?

THE CLERK: I don't. It's not more than that, Judge.

THE COURT: It's a much smaller number than for the domestic.

MS. CLARKE: When do they see the "call to serve" video, the jurors, assuming you show it?

THE COURT: They -- so jurors arrive at 8, I think, roughly. Is that right, Paul?

THE CLERK: It's about 8 to 8:15. Then they all congregate, and then they show the video. And then Jim gives them some preliminaries. Once they see the video, then they can go out and take a break for a few minutes and then come back. Yes, it's first thing in the morning before they go out anywhere.

THE COURT: So roughly 8:30, in that range, I think they see it. I'm not sure they're going to go out for a break this time. Once they come in, they're going to be there, I think. Okay.

I think that may be it for now. We have a couple of -- oh, yeah. There was a reference earlier to the defense -- I think you made a reference to -- defense motion about supporters outside the courthouse. I don't know if you're

going to respond to that.

MR. WEINREB: We weren't planning to.

THE COURT: I don't think there's anything I can do. I can't provide specifically for a location for people because of their point of view.

MR. BRUCK: Yeah.

THE COURT: There is going to be -- the marshals have worked out plans for making sure there's ingress and egress from the courthouse without disturbance. So there will be -- people who are demonstrators will be in one place, and the press will be behind. I think I saw it cordoned the last time. It will be approximately those dimensions. I think people who are doing the planning are cognizant of the *MaCullen* case, 35-foot buffer zone, that 35 is too much. We don't have much of a space there anyway. There's nothing we can do really, I'm thinking. We'll watch it. We'll watch it. But I can't say people who have a particular point of view can't stand where others with a different point of view can stand.

MR. BRUCK: The point of the motion was not for a contact-specific description but just to have -- courthouses are not about demonstrations. They're about fair trials. If there are going to be demonstrators, there's plenty of constitutional warrant for putting them a good distance away from people coming into the courthouse.

THE COURT: As you know, the available distances are

shrinking drastically, and we'll probably be affected by winter conditions as well. Our objective, and I think is consonant with yours, but I can't make any specific orders, I don't think. We'll watch it. If it seems to be a problem, we'll see what we can do to adapt but --

I know that the marshals either know or presume, keep a close eye on bulletin boards and things like that that may be advertising. So they know if someone is planning to show up with 35 people. Generally speaking, they get advisories of that sort of thing. They get a head's up sometimes.

MR. BRUCK: One last suggestion, if I may, about the preamble to the questionnaire. We didn't include it in our version, but it seems like it's going to be a long questionnaire. Some people are going to run out of gas. The most important questions tend to be at the end. Something that says that the more detailed your response is, the faster or shorter the jury selection process will be, something that encourages not only, as we do, to be honest and full and so on but that to give them a reason why they should really try to --

THE COURT: I think the draft we're going to use says something close to that. We'll look at it with that in mind. It does emphasize the importance of the questionnaire as a means of speeding things up, making the process more efficient.

So there were a couple of questions you were going to confer about, I think?

MS. CLARKE: My notes show we were going to look at condensing 18 through 20 and figuring out something about the strongly negative views about the government to add into the 48 series, somewhere in there. We were to give you --

THE COURT: Can we have that by midmorning tomorrow or something? Is that realistic?

MS. CLARKE: Sure.

MR. WEINREB: Yeah.

THE COURT: Say 11:00 tomorrow?

MS. CLARKE: I assume we can merge our witness lists into one.

MR. WEINREB: I'm sure we can do that.

MS. CLARKE: You want that by Friday? What's today?

THE COURT: Today is --

MS. CLARKE: Tuesday.

THE COURT: I'll take your word for it.

MS. CLARKE: I'm glad to hear that.

THE COURT: One last thing. Jane reminds me, there was a motion just filed about identifying foreign witnesses.

MS. CLARKE: Foreign.

THE COURT: Obviously, there hasn't been any time for response. We came here to preview that.

MR. WEINREB: Yeah. We intend to oppose that.

THE COURT: How will that affect the list? I guess it would mean we -- unless it could be resolved by Friday so we

could prepare a list for attachment on Monday, we'd have to leave them off in case I agree with the defense. I think it's highly unlikely that the venire would be familiar with somebody who lived in --

MS. CLARKE: Dagestan, Chechnya.

THE COURT: I was going to try to say the city name but I can't. Makhachkala.

MS. CLARKE: Makhachkala.

THE COURT: There's probably no harm in leaving them off for the time being, or you could get the opposition in in enough time so I could decide it by then whether to include them.

MR. WEINREB: Right. So -- today is Tuesday. We could get it by -- the trial briefs are now due?

THE COURT: Tomorrow.

MR. MELLIN: Your Honor, can we -- are these witnesses just penalty-phase witnesses so there would not be any overseas guilt phase?

MS. CLARKE: Correct.

MR. WEINREB: There's still a question of the jurors.

Can you give us a sense of how many people we're talking about?

MR. FICK: A dozen, less than 20, something like that.

MR. WEINREB: I think they should be -- we'll file something by the end of Thursday.

THE COURT: The witness list was supposed to be yesterday.

MS. CLARKE: We disclosed it.

THE COURT: Can I see it?

MS. CLARKE: No.

(Laughter.)

THE COURT: And these people weren't on it, or were on it?

MS. CLARKE: Were not.

THE COURT: You don't want them to know, is the point of the motion?

MS. CLARKE: That's the point of the motion. The other option would be for us to provide the Court with those names to attach or to provide the jurors without the government seeing it. I just don't think that anybody is going to recognize any of these folks.

MR. MELLIN: Your Honor, could I have one moment to talk to --

THE COURT: Yeah.

(Discussion held off the record.)

MR. WEINREB: So our opposition would be based primarily on the view that we're entitled to know who the witnesses are who are coming, less on the concern that any of the people on the venire will know any of the witnesses since they are from remote parts of the world. So -- and if they are

all penalty-phase witnesses, then it's not urgent that the matter be decided before Monday -- before Friday.

THE COURT: So they could be omitted from the list that goes to the jury.

MR. WEINREB: They could be omitted, although I think it would be worthwhile perhaps talking about what will happen if someone takes the witness stand and a juror says --

MR. MELLIN: Actually, your Honor, I think it may be wise to add them to the witness list and we do not see the list that is produced to the jurors that they look at. Is that fair for you? So that if you add them to the list that the jurors are looking at, then we're all covered if this issue were to come up later. The names are on that list. Jurors have a chance to see them. We just do not see that list.

MR. BRUCK: Well --

MS. CLARKE: That's one of the things we suggested.

MR. FICK: We may need to ask, Do you know anyone who lives in Pakistan, Chechnya?

THE COURT: Didn't we ask that?

MR. FICK: There's a question of whether you know anybody of those ethnic backgrounds. I guess, when you think about it, some of these people may live in a place and not be of the same ethic background. It might be safer to make it geographic for this purpose.

THE COURT: Question 69, "If you know anyone who, to

the best of your knowledge, is Chechen, Avar, Dagestani or Chechen, Avar or Dagestani descent...," you could maybe massage that.

MR. BRUCK: Or who lives in?

MR. WEINREB: I propose a different solution. If defense is willing to bear the risk that a juror will know one of these witnesses, then that witness will be barred from testifying. If the defense is confident enough that the jurors aren't going to know any of them, then that doesn't seem like a --

MS. CLARKE: I don't think we should ever agree to a barring of a penalty-phase witness.

MR. MELLIN: I think you're covered by the question though. 69 says, "Please describe who it is you know and how you know them." So if they do know someone who's Dagestani, they can say, This is the person I know.

MR. WEINREB: If they know the person is Dagestani.

THE COURT: Are those all the categories you want to ask about?

MR. FICK: Probably.

THE COURT: Avar is an ethic group rather than a geographically defined group, right?

MS. CLARKE: Right.

MR. FICK: Where Chechen is both ethnic and geographic.

THE COURT: Right.

MR. WEINREB: I would seriously doubt any of the jurors, even if they know any of the witnesses, would know they're Avar or Chechen. I don't know that that's going to be a sufficient screening.

THE COURT: We could add something about it. Do you know anybody who lives in the following countries?

MR. WEINREB: Again, I think the more pertinent question is, if somebody takes the witness stand and one of the jurors raises their hands and says, I know that person, I went to college with that person, I had no idea they were Avar or Chechen, what's the solution going to be? I'm just looking for the practical answer.

MR. WATKINS: We have six alternates if that, indeed, happens.

THE COURT: That's a possible answer.

MR. WEINREB: That's a possibility.

THE COURT: It is possible for -- particularly, we know it because there are people we can think of in this cast of characters who have come here to study and who have gone back, or maybe they're not present characters, but there are people who could be in that category. The world is a lot more mobile than it used to be. Mr. Todashev is an example of that.

MS. CLARKE: Do you want to go --

THE COURT: It is possible that they could have come

in contact with somebody here.

MS. CLARKE: Do you want to go with Steve's suggestion and we create the entirety of the list?

MR. WEINREB: I don't -- I think it's a -- it is a measure. I don't think it's a sufficient measure because I don't think that many people could tell you with respect to --

THE COURT: No, no. He's talking about the confidential list.

MR. WEINREB: The confidential list, that, of course, would be sufficient.

THE COURT: Why don't we do that. I think it will require some special handling in the jury, but I think we can probably do that. If we can't, then we'll have to think of something else.

So that then, I guess, relieves any time frame to brief that issue about ultimate disclosure to the government when and whatever.

Okay. All right. I think it's lunchtime. Thank you.

(Whereupon, at 1:04 p.m. the hearing concluded.)

C E R T I F I C A T E

We, Marcia G. Patrisso, RMR, CRR, and Cheryl Dahlstrom, RMR, CRR, Official Reporters of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of our skill and ability, a true and accurate transcription of our stenotype notes taken in the matter of Criminal Action No. 13-10200-GAO, United States of America v. Dzhokhar A. Tsarnaev.

/s/ Marcia G. Patrisso
MARCIA G. PATRISSO, RMR, CRR
Official Court Reporter

/s/ Cheryl Dahlstrom
CHERYL DAHLSTROM, RMR, CRR
Official Court Reporter

Date: January 26, 2015